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IN THE

Supreme Court of the United States

October Term, 1967.

No. 927

IN THE MATTER
OF
LANDON ZUCKERMAN and SAM HABER,
Petitioners,

against

SAMUEL GREASON,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1967
(8596)

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LANDON ZUCKERMAN and SAM HABER,

Petitioners,

against

SAMUEL GREASON,

Respondent.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

The petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on October 31, 1967.

Opinions Below.

The opinion of the Court of Appeals and the dissenting opinion appear in Appendix B and Appendix BB, pages 15, 22. They have not yet been reported. The earlier *per curiam* memorandum of the Court of Appeals is incorporated in the opinion, Appendix B, page 16, and is reported in 19 N. Y. 2d 977. The Appellate Division wrote a memorandum after the mandate of this court was

issued. It is reported in 27 A. D. 2d 848, and appears in Appendix B hereto, page 15. After its order was reversed by the Court of Appeals it wrote another memorandum which appears in Appendix C hereto, page 23; it is reported in 28 A. D. 2d 907.

Jurisdiction.

The judgment of the Court of Appeals of the State of New York is dated October 31, 1967, and entered on that day, Appendix I, *post,* page 48. The jurisdiction of this court is invoked under 28 U.S.C., Section 1257(3).

Questions Presented.

1. Did the Appellate Division fulfill the mandate of this court which issued upon the vacatur of the order of that court by this court on February 13, 1967?

2. After this court vacated the orders against these petitioners, 386 U. S. 15, and remanded the case for reconsideration, should not the principles of *Garrity v. New Jersey,* 385 U. S. 493, as well as *Kaye v. Co-ordinating Committee on Discipline,* U. S. , 87 S. Ct. 848, have been applied to this case?

3. Since the record shows that the findings of guilt by the referee were based upon the testimony and records compelled by subpoenas in the face of the then existing rule of *Cohen v. Hurley,* 366 U. S. 117, should not the proceedings against these petitioners have been dismissed, or should not the findings based on such testimony and records and leads produced by them have been eliminated?

4. Were not the petitioners denied due process of law in that the Appellate Division sat in judgment in its own cause, since the record is clear that the Appellate Division created the judicial inquiry, appointed the respondent the

prosecutor of it, acted as accuser, and then sat in judgment in the prosecution of petitioners?

5. Did not Section 90, subdivision 2, of the Judiciary Law of New York deny due process of law to the petitioners in that it is overbroad and vague, and enables abuse in its application?

6. After the Court of Appeals remanded the case to the Appellate Division were not petitioners denied due process of law by the failure of the Appellate Division to hold a hearing *de novo* to take testimony on the voluntariness of their testimony, especially after a request for same?

7. Was not the application of Rule 7 to the petitioners of alleged conduct prior to its enactment, a violation of the constitutional proscription against *ex post facto* application of a law?

8. Since guilt is personal, was not the failure of the referee to find separately as to which of the petitioners was guilty of specific conduct, a denial of due process?

Statute Involved.

The statutory provisions involved are Section 90, subdivision 2, of the Judiciary Law of New York and Special Rule of the Appellate Division, Second Department. They are printed in Appendix E, *infra,* page 28.

Statement.

This application for a review arises out of a grant of certiorari and a vacatur by this court of the order of discipline by the Appellate Division, Second Department, and the remand by this court of the case to that court, *Zuckerman and Haber v. Greason,* 386 U. S. 15, decided February 13, 1967. A copy of the *per curiam* decision of this court is printed in Appendix A, *infra,* page 14. On

March 13, 1967, the mandate of this court issued. Without notice to petitioners or affording them an opportunity to be heard, the Appellate Division made a new order dated March 20, 1967, by which it eliminated the charge against Zuckerman in which it had been alleged that he was guilty of professional misconduct because he had invoked the privilege against self-incrimination when asked to produce records concerning his conduct as a lawyer and reinstated the same discipline upon appellant Haber that had been made by the Appellate Division before review by this court.

The petitioners appealed to the Court of Appeals, claiming they had been denied due process by the failure of the Appellate Division to accord them notice and opportunity to be heard because they were entitled to have the proceeding dismissed as the evidence against them was tainted in that it was procured by the compulsion of the then existing rule of *Cohen v. Hurley,* 366 U. S. 117, and which was now overruled by *Spevack v. Klein,* 385 U. S. 511. Petitioners contended that *Garrity v. New Jersey,* 385 U. S. 493, prevented such testimony from being used against them. They also desired to raise other federal issues that had been presented to this court in their previous application for certiorari, but not passed upon by this court (see, Petition for Writ of Certiorari, October Term, 1966, No. 71, at p. 4). The Court of Appeals reversed the order of the Appellate Division and remanded the case, not only to afford notice and a hearing to petitioners, but also because "the reversal by the United States Supreme Court of the orders in these disciplinary proceedings, with remand to the Appellate Division, leaves room for interpretation," 19 N. Y. 2d 977, 978, *infra,* page 16.

Thereupon, the Appellate Division afforded petitioners an opportunity to present arguments. Petitioners filed

motions to dismiss the proceedings (Appendix F and Appendix G, *infra,* pp. 29, 34). But the Appellate Division did not hold hearings to take additional testimony though requested (*post,* pp. 33, 45). In the motions to dismiss the petitioners repeated the contentions they made in the Court of Appeals, that *Garrity v. New Jersey, supra,* controlled, and since all the evidence was tainted, the proceedings should be dismissed. Petitioners also contended that the proceedings were unconstitutional because the statute, Section 90, subdivision 2, is vague, that the Appellate Division was sitting in a cause in which it was the initiator of the proceedings, accuser, and the judge, and that Rule 7 was applied *ex post facto,* and that the Referee failed to make specific findings separately as to the personal guilt of each of the petitioners.

Although the Court of Appeals had remitted the case to the Appellate Division to make an interpretation in the light of the contention that *Garrity v. New Jersey* applied, the Appellate Division made no such interpretation. In fact, it invoked for the first time a new reason to adhere to its former disposition. It now held that the failure of the petitioners to note their objection to the reception of the tainted evidence precluded the consideration of *Garrity v. New Jersey, infra,* page 4.

Upon a new appeal to the Court of Appeals (resulting in the judgment now before this court for review), that court disregarded entirely the contention that the petitioners were barred on the procedural ground that respondent had urged. The Court of Appeals decided the case on the merits and on federal grounds (disregarding, however, without comment, the federal grounds other than the applicability of *Garrity v. New Jersey*). That court, with Chief Judge Fuld in dissent, held that *Garrity v. New Jersey* did not apply because it was a criminal case, as distinct from this case which is a disciplinary proceeding.

Chief Judge Fuld, dissenting, held that the petitioners at the time they testified were controlled by *Cohen v. Hurley* and thus had only Hobson's choice. He said that the least that could be granted to the petitioners is a hearing to determine whether petitioners (as partners) gave testimony voluntarily or whether they gave it under the compulsion of *Cohen v. Hurley, infra,* page 22. The majority, however, refused to provide such a test merely because it "would be a speculative inquiry, incapable of and unsuitable to being resolved as a question of fact," *infra,* page 21. But—and this deserves emphasis—Chief Judge Fuld said in his opinion that if such course would prove speculative, then the issue *must be resolved in favor of petitioners by a dismissal of the charges, infra,* page 22. It cannot be otherwise, because the burden is on the respondent at all stages to prove his case.

Stage and Manner of Raising Federal Questions.

After the Court of Appeals remitted the case to the Appellate Division for a hearing after notice, the Appellate Division afforded petitioners an opportunity to file papers, briefs and to argue the matter. Accordingly, the petitioners filed their separate notices of motion to disaffirm the Referee's report and to dismiss the proceedings, Appendices F and G, *infra,* pages 29, 34. In said motions the petitioners raised the federal questions here presented. The Appellate Division disposed of the questions in its memorandum, Appendix D, *post,* page 25. Upon appeal to the Court of Appeals, petitioners again raised those questions in their briefs and oral arguments. The Court of Appeals passed on some of those questions (Opinion, Appendices B and BB, *infra,* pp. 15, 22).

Reasons for Granting the Writ.

This case raises several novel and significant questions:

1. The foremost is the question whether the *Garrity* case applied. When this court vacated the order of discipline and remanded this case to the Appellate Division "in the light of *Spevack v. Klein,* 385 U. S. 511, it was implicit that the doctrine of *Garrity v. New Jersey* was applicable. *Garrity* was decided and embraced within *Spevack,* as the opinion of this court makes clear. Both of those cases are interwoven. The principle of *Spevack* is that one should not be punished or suffer a disability because he had invoked the privilege against self-incrimination, and *Garrity* holds that evidence obtained through the coersion of an unconstitutional condition cannot be used subsequently against the person compelled to give it.

Moreover, on the very same day (February 13, 1967) that this court vacated the order in this case, it also vacated the order of discipline in *Kaye v. Co-ordinating Committee on Discipline, supra.* In the *Kaye* case, Kaye *had testified.* His contention in this court was that the coercive force of the very existence of *Cohen v. Hurley* had compelled him to testify. That is exactly what the petitioners here claim. They should receive the same benefits of *Spevack* and *Garrity* that *Kaye* received.

This court's vacatur indicates that it had *Garrity* in mind, for it vacated as to *Haber,* who had *not* invoked the privilege, as well as to *Zuckerman,* who did. Why would this court have favored *Haber* if it did not intend *Garrity* in its interpretation. Indeed, the respondent had moved fruitlessly for a rehearing in which it had questioned this court's decision as to *Haber,* U. S. , 87 S. Ct. 1016.

Indeed, this court said in *Miranda v. Arizona*, 384 U. S. 436, 468:

> "Today, then, there can be no doubt that the Fifth Amendment privilege is available *outside* of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."

The Court of Appeals, in its opinion held that *Garrity* does not apply because *Garrity* involved a criminal prosecution, whereas this case is a disciplinary proceeding. This is a glaring error, because in *Spevack* that very same issue was determined in favor of *Spevack*. In that case this court said that the loss of standing as a lawyer was as much punishment as the imposition of any other penalty or disability.

The Court of Appeals was contradictory in its opinion, because it immediately modified its words, by stating: "We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is settled to the contrary. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment and crime," citing *Matter of Rouss*, 221 N. Y. 81, 86. Even if the due process issue involved in this case, whether the evidence coerced under an unconstitutional condition may be used to deprive petitioners of their professional standing, were limited to cases where disclosure may expose to criminal punishment, the answer is that the charges against petitioners are covered by the New York Penal Law, Article 24, effect at the time the charges were made.

But we urge, however, that *Spevack*, *Garrity*, and *Kaye* have made plain that coerced and tainted testimony cannot be used to inflict any kind of punishment or disability.

Chief Judge Fuld dissenting, assumed that *Garrity* applied and that Zuckerman and Haber, law partners, were faced with a Hobson's choice of not testifying and being disbarred under the then prevailing doctrine of *Cohen v. Hurley* or else testifying and being disciplined. He further held that any question whether the petitioners had testified voluntarily (and not because of the fears of the consequences of *Cohen v. Hurley*) should be the subject of a hearing. To the latter the majority opinion replied "would be a speculative inquiry, incapable of and unsuitable to being resolved as a question of fact." This is an extraordinary disposition, considering what is at stake. It deprives these petitioners of their standing as lawyers just because it is assumed that the proof will be difficult to evaluate!

Chief Judge Fuld forcefully replied, however, that if it would be speculative, *then the charges against petitioners should be dismissed, infra,* page 21.

Assuming that *Garrity* and *Spevack* are both applicable to this case, the question then is whether there is any proof, not tainted by the compelled testimony of petitioners, to sustain the findings against the petitioners. Although the burden of proof was on respondent to adduce such evidence, none came forth. Such proof could not be produced. The record makes clear that the evidence used to support the findings of the referee was obtained through the records and testimony furnished by Haber and his law partner, Zuckerman, or from leads obtained through such records. The report of the referee, throughout, makes it plain that the evidence was of the tainted nature found in *Garrity* (see for example, Report, pp. 5, 20). The bill of particulars likewise points to the same conclusion. The stenographic minutes of the hearings, pages 23, 25-27, 28-155, 446-467, 467-475, demonstrates petitioners' contention. The multifarious subpoenas served on the petition-

ers by the Judicial Inquiry, *post,* page 46, support the argument that the testimony and records were obtained by compulsion. Between 150 and 200 files of the petitioners were examined (stenographic minutes, p. 440). The petitioners were questioned at about 11 sessions, plus questioning by telephone (stenographic minutes, pp. 450-451).

Annexed hereto, Appendix J, *infra,* page 51, is a breakdown of the use of the evidence obtained through the subpoenas, in the bill of particulars and in the Referee's report.

It is submitted, that the *in terrorem* effect of *Cohen v. Hurley* compelled the testimony. No contention to the contrary has been offered, for none can be persuasive.

And it should also be observed that the respondent's argument below was principally that the petitioners have no standing to raise the issues here presented, because they had not objected to the reception of the tainted evidence. Even the Court of Appeals rejected that contention, saying, "If Zuckerman and Haber's constitutional contention be correct on this appeal, it might be argued with some force that neither of them was obliged to object in order to raise the point, in as much as making that objection could have resulted automatically in their disbarment for so long as *Cohen v. Hurley* remained the law," *post,* page 19.

2. Because this court had vacated the order of the Appellate Division in the light of *Spevack,* it did not pass upon the other questions they had raised in the previous petition for a writ of certiorari. At the Appellate Division and in the Court of Appeals the petitioners again raised those questions, *post,* 28, 33. The vacatur of the order reopened the proceeding and the petitioners were correct in again tendering the issues this court did not pass upon because it had decided in petitioners' favor on other

grounds. *Communist Party of the United States v. Subversive Activities Control Board,* 254 F. 2d 314.

The petitioners contend that Section 90, subdivision 2, of the Judiciary Law is vague and overbroad and leads to abuses. The statute reads as follows:

> "The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice."

Under this statute the petitioners have been suspended for five years because of a zealous and diligent devotion to their clients' interests. Petitioners are charged with having submitted exaggerated bills of particulars and with procuring statements from adversary witnesses in violation of a rule against obtaining statements from adverse parties. The referee construed the rule to apply to *witnesses.*

The overbroadness of the statute does not provide a standard of conduct for lawyers. *Winters v. New York,* 333 U. S. 507; *Keyishian v. Board of Regents,* 385 U. S. 589.

The overbroadness of the statute leads to abuses, and enables the Appellate Division to make up its rules of behavior *ad hoc.* It provides an opportunity to disbar a lawyer because he had committed adultery, *Matter of*

Titus, 66 Hun 362, or because an attorney in his capacity of landlord took excessive rent and wrote scurrilous letters to his tenants, *Matter of Chopak,* 11 A. D. 2d 78. These are just two instances in a long catalog. The statute does not provide standards and therefore provides abuse. See also, *Willner v. Character Committee,* 373 U. S. 96; *Schware v. Board of Bar Examiners,* 353 U. S. 232, 238.

3. In creating the investigating and prosecutorial arm, the Appellate Division could not constitutionally sit in judgment in its own case. The Judicial Inquiry was created by the Appellate Division. The Appellate Division appointed respondent Samuel Greason as its prosecuting arm. The respondent, as the representative of the Appellate Division, then filed charges against petitioners, accusing them of the claimed wrongs. The Appellate Division thereafter sat in judgment in the case. We submit, that *Re Murchison,* 349 U. S. 133; *In re Oliver,* 333 U. S. 257; *Tumey v. Ohio,* 273 U. S. 510, and *Offutt v. United States,* 348 U. S. 11, have given the answer that due process fundamentally requires that a court do not sit in judgment in its own cause. This issue was not resolved in *Anonymous v. Baker,* 360 U. S. 287.

4. The petitioners have been found guilty of violating Rule 7 in that they procured statements from adversary parties. That rule was enacted by the Appellate Division, Second Department, on July 1, 1960. Yet the evidence adduced to support the violations refers to alleged violations that occurred prior to July 1, 1960. Such an application of the rule was *ex post facto* because it makes punishable an action that was innocent when done, *Calder v. Bull,* 3 Dallas 386, and *Bouie v. City of Columbia,* 378 U. S. 347, where a conviction based on a new construction of a statute was nullified.

5. The petitioners have been disciplined because, among other things, they caused an investigator to procure state-

ments from adverse witnesses. Even if the statements were from adverse parties, a serious question still remains whether a lawyer should be punished because, out of zeal for his client, he exercises his judgment toward the client's best interests. This court granted review in a very similar case, *Matter of John Ruffalo, Jr.*, No. 73, October Term, 1967, certiorari granted October 9, 1967, where an attorney was disbarred for hiring an employee as undercover agent to obtain evidence in a personal injury claim.

CONCLUSION.

For the foregoing substantial reasons, this petition for a writ of certiorari should be granted.

Dated, November 15, 1967.

Respectfully submitted,

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APPENDIX A.

Opinion of the Supreme Court of the United States.

LANDON ZUCKERMAN, *et al.*,

Petitioners,

v.

SAMUEL GREASON.

..... U. S. ....., 17 L. Ed 2d 696, 87 S. Ct. .....

(No. 71)

February 13, 1967

On Petition for Writ of Certiorari to the Appellate Division of the Supreme Court of New York, Second Judicial Department.

Same case below, 23 A. D. 2d 825, 259 N. Y. S. 2d 963.

Per Curiam.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Division of the Supreme Court of New York, Second Judicial Department, for reconsideration in light of *Spevack v. Klein,* 385 U. S. 511, 17 L. Ed. 2d 574, 87 S. Ct. 625.

Mr. Justice Clark, Mr. Justice Harlan, and Mr. Justice Stewart would affirm the judgment below for the reasons set forth in Mr. Justice Harlan's dissenting opinion in *Spevack v. Klein,* 385 U. S. 520, 17 L. Ed. 2d 581.

Mr. Justice White dissents for the reasons stated in his dissenting opinion in *Garrity v. New Jersey,* and *Spevack v. Klein,* 835 U. S. 530, 17 L. Ed. 2d 586.

APPENDIX B.

Opinion.

IN THE MATTER

of

LANDON ZUCKERMAN and SAM HABER, Attorneys,

Appellants,

SAMUEL GREASON,

Respondent.

Decided October 31, 1967.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 10, 1967, which unanimously suspended appellants from the practice of law for five years commencing *nunc pro tunc* as of April 10, 1965, with leave to apply for reinstatement after that period of five years. (See 386 U. S. 15, 19 N. Y. 2d 977.)

Emanuel Redfield for Sam Haber, appellant.
Landon Zuckerman, appellant in person.
Harold M. Spitzer for respondent.

VAN VOORHIS, J. On March 3, 1965 appellant Landon Zuckerman was disbarred and appellant Sam Haber was suspended from the practice of law for a period of five years (23 A. D. 2d 825). Charges numbered 5-B, 5-F and 5-H were sustained against both defendants and charge 5-A was sustained as to Zuckerman only. The other charges were dismissed. A motion for leave to appeal

to this court was denied July 9, 1965 (16 N. Y. 2d 482): On February 13, 1967 the United States Supreme Court granted certiorari, vacated the order of the Appellate Division and remanded the case to that court "for reconsideration in light of *Spevack v. Klein*, 385 U. S. 511" (386 U. S. 15). The mandate of the Supreme Court stated that this was done in order that such proceedings might be had "as accord with right and justice, and the Constitution and laws of the United States." On March 20, 1967 the Appellate Division, without notice to Zuckerman or Haber, or opportunity to them to be heard, dismissed charge 5-A against Zuckerman and sustained charges 5-B, 5-F and 5-H against both. That was the same disposition which had been made by the Appellate Division before review by the Supreme Court, except that charge 5-A was dismissed against Zuckerman and he, also, was suspended for five years instead of being disbarred (27 A. D. 2d 848).

On appeal to this court, we reversed the order of the Appellate Division for lack of due process in not affording an opportunity to be heard (19 N. Y. 2d 977, 978) in the following memorandum:

"The reversal by the United States Supreme Court of the orders in these disciplinary proceedings, with remand to the Appellate Division, leaves room for interpretation. Consequently due process required notice to appellants and opportunity to be heard before the determinations were made by the Appellate Division culminating in the order of suspension entered March 20, 1967, from which this appeal is taken.

"The order appealed from should be reversed and the matter remanded to the Appellate Division for further consideration upon notice to appellants and after they shall have had opportunity to be heard as above mentioned."

After a hearing—no further evidence was offered—the Appellate Division entered an order on July 10, 1967 to the same effect as its order of March 20, 1967 (28 A. D. 2d 907). Haber and Zuckerman now appeal from that order of July 10, 1967.

The main argument which is addressed to us is that the charges which were sustained (5-B, 5-F, 5-H) were based, in part, at least, upon disclosures made by Haber and Zuckerman under the compulsion of *Cohen v. Hurley* (366 U. S. 117), which held that an attorney might be disbarred for refusing to testify in a disciplinary proceeding as a result of invoking his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States. *Cohen v. Hurley* was overruled by *Spevack v. Klein* (385 U. S. 511), on the basis that *Cohen v. Hurley* could not have been decided as it was if the applicable portion of the Fifth Amendment had then been held to have been mandated on the States by the Fourteenth Amendment, as it was subsequently held to be in *Malloy v. Hogan* (378 U. S. 1). *Spevack v. Klein* decided that a lawyer could not be disciplined on the ground that he had failed to co-operate with the court by remaining silent when questioned concerning his professional conduct if he invoked the Fifth Amendment. In *Garrity v. New Jersey* (385 U. S. 493), decided at the same time with *Spevack*, police officers were convicted of crime on the basis of statements which they made regarding their official conduct in a State which had a statute providing that a public employee should be removed from office if on Fifth Amendment grounds he refuses to answer any material question before any commission or body which has the right to inquire about matters relating to his office or employment. It was held that the existence of that statute coerced these police officers into failing to invoke the Fifth Amendment and that, therefore, what they said in answer to official inquiries should not have been admitted into evidence against them in a criminal prosecution.

Garrity v. New Jersey was not cited in the *Per Curiam* opinion by the Supreme Court in *Zuckerman and Haber* (386 U. S. 15). The remand to the Appellate Division was "for reconsideration in light of *Spevack v. Klein*" not *Garrity v. New Jersey*. This is understandable, inasmuch as *Garrity* involved the review of criminal convictions of public officers—which these appeals do not—whereas *Spevack* concerned disciplinary proceedings for professional misconduct of an attorney who was a private citizen, which Zuckerman and Haber are.

The Appellate Division, by the order now appealed from, evidently construed the Supreme Court determination as requiring the dismissal only of charge 5-A against Zuckerman, which charged his failure to co-operate with the Appellate Division by invoking the Fifth Amendment insofar as the production of his records was concerned which might have tended to incriminate him in connection with impending charges of income tax evasion by the Internal Revenue Service. Overruling of *Cohen v. Hurley* eliminated that specification as a charge of professional misconduct.

The charges which were sustained by the Appellate Division after reversal by the Supreme Court, are that both appellants submitted misleading, exaggerated and false medical bills and statements covering lost time and earnings of clients for the purpose of inducing various insurance companies to part with money in reliance thereon (5-B); that both built up medical bills for submission to insurance companies by referring claimants with simple injuries to a succession of medical specialists without communication with their attending physicians (5-F); and that both, in violation of the Canons of Ethics, used investigators to obtain signed retainers, to obtain statements from adverse parties represented by attorneys and to obtain the clients' signatures on blank forms for the appointments of guardians ad litem (5-H).

There is evidence to sustain those charges. Appellants now contend that sustaining them wholly or partly on the

basis of data submitted by Zuckerman and Haber is unconstitutional under the holding of the Supreme Court in their case in the light of *Spevack* and *Garrity*. Haber made his disclosures without making any claim of privilege under the Fifth Amendment. He excused his omission to produce certain partnership papers for the reason that he had delivered them to Zuckerman, who had them in his possession. Zuckerman objected to disclosure of records, invoking the Fifth Amendment, insofar as they related to his income tax status. No objection appears to have been made in *Garrity* to disclosure of incriminating information, evidently for the reason that to have taken such an objection would have forfeited their public offices as policemen under the terms of the New Jersey statute. If Zuckerman and Haber's constitutional contention be correct on this appeal, it might be argued with some force that neither of them was obliged to object in order to raise the point, inasmuch as making that objection could have resulted automatically in their disbarment for so long as *Cohen v. Hurley* remained the law. It may well be that if Zuckerman or Haber had been prosecuted for crime, any disclosures made in their disciplinary proceedings would have to have been excluded from evidence in the criminal action following the precedent of *Garrity v. New Jersey*. Likewise, under *Spevack v. Klein*, neither of them could have been suspended or disbarred merely for the reason that he had invoked the Fifth Amendment. Neither of those things have occurred. They made disclosure of facts which, in combination with other evidence, have been held to sustain charges 5-B, 5-F and 5-H. They take the position, to which they are driven by the logic of their own contention, that every lawyer has been unconstitutionally disbarred or suspended who has made disclosure of his professional conduct in disciplinary proceedings after the decision of the Supreme Court in *Cohen v. Hurley* and before its decision in *Spevack v. Klein*. They point out that the Supreme Court reversed the sus-

pension of Haber as well as the disbarment of Zuckerman, even though Zuckerman alone had been found to have refused to co-operate by invoking the Fifth Amendment (5-A). It is said that unless the Supreme Court agreed with appellants' present argument in this court, it would have affirmed the suspension of Haber and reversed the disbarment of Zuckerman.

It is more likely, perhaps, that the reversal of the disciplinary measures imposed upon each was due to the thought that since the order had to be reversed as to Zuckerman (because of the overruling of *Cohen v. Hurley*) fairness dictated that Haber should be given another chance also. They had been partners, they were disciplined by a single order, and the Supreme Court may have considered that the Appellate Division might have punished Haber less severely than it had done if the punishment of Zuckerman were to have been less severe.

The Fifth Amendment relates to self-incrimination on charges of crime. Disciplinary proceedings for professional misconduct are civil in nature (*Matter of Phillies*, 17 A. D. 2d 93, and cases cited, mot. for lv. to app. den. 12 N. Y. 2d 645). It is sufficient protection to a lawyer in such a situation that he could not be prosecuted for crime on the basis of disclosures which he might have made in a disciplinary proceeding while *Cohen v. Hurley* remained the law. The Fifth Amendment states that no person "shall be compelled *in any criminal case* to be a witness against himself" (italics supplied). These men have made the disclosures which have contributed to the disciplinary measures which have been imposed upon them. They are not charged with crime. "The [State] Constitution says that no person 'shall be compelled in any criminal case to be a witness against himself' (Const., art. I, sec. 6). A proceeding looking to disbarment is not a criminal case (*Matter of Randel, supra* [158 N. Y. 216]). We do not suggest that the witness is protected by the Constitution only when testifying in the criminal courts. The law is

settled to the contrary. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime" (*Matter of Rouss*, 221 N. Y. 81, 86, CARDOZO, J.). The evidence which these appellants produced before the Referee cannot be used against them in any criminal proceeding. They had no privilege against making disclosure usable only in a disciplinary proceeding. The constitutional privilege applies only in the case of evidence which might be used against them in a criminal case under the language of the Fifth Amendment. Haber and Zuckerman may have thought that unless they produced this evidence that they would be disbarred under *Cohen v. Hurley*, but neither *Garrity* or *Spevack* confers upon them a constitutional privilege to withhold evidence which cannot lead to criminal prosecution and bears only upon their right to continue to practice law.

Lawyers are officers of the court and their professional conduct is subject to the supervisory and corrective powers of the Appellate Division (Judiciary Law, §90; *Matter of Kaufmann*, 245 N. Y. 423, 432; *Matter of Dolphin*, 240 N. Y. 89; *Matter of Flannery*, 212 N. Y. 610). They are not required to invoke the Fifth Amendment to the Constitution of the United States but may choose to reveal their professional conduct to the scrutiny and evaluation of the Appellate Division when its propriety is drawn in question. To determine whether they have been motivated in doing so by the holding in *Cohen v. Hurley* prior to the decision in *Spevack v. Klein* or by other reasons would be a speculative inquiry, incapable of and unsuitable to being resolved as a question of fact. It would simply mean that every lawyer who has been censored, suspended or disbarred during the interval between the two Supreme Court cases cited would be entitled to have his disciplinary order overruled wherever the court has retained jurisdiction.

The order appealed from should be affirmed, without costs.

APPENDIX BB.

Dissenting Opinion of Chief Judge Fuld.

Chief Judge FULD (dissenting). By reason of *Cohen v. Hurley* (366 U. S. 117), the appellants were faced with a Hobson's choice of disbarment or the production of the documentary evidence and the giving of the testimony upon which their suspensions depend. It seems to me that the rationale underlying *Spevack v. Klein* (385 U. S. 511), as well as the Supreme Court's mandate to the Appellate Division (386 U. S. 15), requires that there be an inquiry to ascertain whether the appellants (or either of them), absent the compulsion stemming from the *Cohen* decision, would have asserted their privilege against self-incrimination, whether, in other words, the testimony given by them, seemingly voluntary, was actually so and, if not, whether evidence from other sources justified the disciplinary action taken against them. There are other reasons why lawyers may, and frequently do, choose to testify when charges are filed against them but whether these appellants gave their testimony under the compulsion of *Cohen v. Hurley* (366 U. S. 117, *supra*) is a question of fact to be considered and resolved like other issues of fact.[1] If, as the majority concludes, such an inquiry would be too speculative, then, the charges should be dismissed unless supported by other evidence.

Accordingly, I would reverse the orders appealed from and remand the matter to the Appellate Division for further proceedings.

Judges BURKE, SCILEPPI, BERGAN, KEATING and BREITEL concur with Judge VAN VOORHIS; Chief Judge FULD dissents and votes to reverse in a separate opinion.

Order affirmed.

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[1] Since one of the appellants actually asserted his privilege at one point, the question arises whether he was, indeed, impelled by the holding in the *Cohen* case to refrain from claiming the privilege in connection with the balance of his testimony.

APPENDIX C.

Opinion and Slip Decision.

Appellate Division, March 20, 1967

APPELLATE DIVISION—SECOND DEPARTMENT.

IN THE MATTER

of

LANDON ZUCKERMAN and SAM HABER, Attorneys.

SAMUEL GREASON,

Petitioner,

LANDON ZUCKERMAN and SAM HABER,

Respondents.

Decided March 20, 1967.

Justices BELDOCK, CHRIST, BRENNAN, RABIN and HOPKINS.

On March 3, 1965, this court disbarred respondent Zuckerman based on its finding that he was guilty of charges 5A, 5B, 5F and 5H as specified therein, and suspended respondent Haber for 5 years based on its finding that he was guilty of charges 5B, 5F and 5H (23 A. D. 2d 825, where the charges are set out in full). The Court of Appeals denied leave to appeal (16 N. Y. 2d 482, 483) and thereafter dismissed respondents' appeal taken as of right (16 N. Y. 2d 992).

On February 13, 1967, the Supreme Court of the United States granted certiorari, vacated the judgment of this court and remanded the matter to this court for reconsideration in light of *Spevack v. Klein* (385 U. S. 511) (*Zuckerman v. Greason,* ..... U. S. ....., 87 Sup. Ct. 847). On March 13, 1967, the order of remand was made.

On reconsideration, this court dismisses charge 5A, which had been found established only against respondent Zuckerman, on the authority of *Spevack v. Klein* (385 U. S. 511, *supra*). There is ample evidence in the record to sustain charges 5B, 5F and 5H against both respondents. As to these charges, Spevack has no application. Accordingly, we confirm the referee's report, finding both respondents guilty of charges 5B, 5F and 5H. Based on these findings, both respondents are suspended from the practice of law for a period of five years, *nunc pro tunc* as of April 10, 1965.

APPENDIX D.

Memorandum.

Nos. 1794, 1795 and 1796.

IN THE MATTER

of

LANDON ZUCKERMAN and SAM HABER, Attorneys.

SAMUEL GREASON,

Petitioner,

LANDON ZUCKERMAN and SAM HABER,

Respondents.

On March 3, 1965 this court disbarred respondent Zuckerman based on its finding that he was guilty of charges in the petition specified as 5A, 5B, 5F and 5H, and suspended respondent Haber for five years, effective April 10, 1965, based on its finding that he was guilty of charges in the petition specified as 5B, 5F and 5H (23 A. D. 2d 825, where the charges are set out in full). The Court of Appeals denied leave to appeal (16 N. Y. 2d 992). On February 13, 1967 the Supreme Court of the United States granted certiorari, vacated the judgment of this court and remanded the matter to this court for reconsideration in light of *Spevack v. Klein* (385 U. S. 511); *Zuckerman v. Greason* (..... U. S. .....). On March 13, 1967 the order of remand was made (*Matter of Zuckerman and Haber*, 27 A. D. 2d 848). On March 20, 1967, on reconsideration and on the authority of *Spevack*, this court dismissed charge

5A, which had been established only against respondent Zuckerman, and stated that there was ample evidence in the record to sustain charges 5B, 5F and 5H against both respondents and that, as to those charges, Spevack had no application. Accordingly, this court confirmed so much of the Referee's report as found both respondents guilty of charges 5B, 5F and 5H and, on those findings, suspended both respondents from the practice of law for a period of five years, *nunc pro tunc* as of April 10, 1965.

On June 1, 1967 the Court of Appeals reversed the order of this court, remanded the disciplinary proceedings to this court for further consideration in accordance with its memorandum and stated that the "reversal by the United States Supreme Court of the orders in these disciplinary proceedings, with remand to the Appellate Division, leave room for interpretation. Consequently due process required notice to appellants and opportunity to be heard before the determinations were made by the Appellate Division culminating in the order of suspension entered March 20, 1967, from which this appeal is taken" (..... N. Y. 2d .....).

Upon due notice, this Court accorded the parties an opportunity to be heard. Thereupon, Chief Counsel for the Judicial Inquiry moved for an order dismissing the finding of guilt as to charge 5A and sustaining the findings of guilt as to both respondents as to charges 5B, 5F and 5H. The respondents moved for orders dismissing the proceedings, disaffirming the Referee's findings and reports as to charges 5A, 5B, 5F and 5H, and for other relief.

Motion by Chief Counsel for the Judicial Inquiry is granted and the motions by respondents are denied. There is ample evidence, which was received without objection on constitutional grounds, to sustain charges 5B, 5F and 5H against both respondents (*Matter of Leogrande v. State*

Liquor Authority of the State of New York, ... N. Y. 2d ....., decided April 20, 1967; cf. *Matter of Gardner v. Broderick,* ..... N./Y. 2d ....., decided July 7, 1967). We are of the view that as to those charges *Spevack (supra)* and *Garrity v. New Jersey* (385 U. S. 493) have no controlling application. Accordingly, this court again confirms so much of the Referee's report as found both respondents guilty of charges 5B, 5F and 5H. Based on those findings, both respondents are suspended from the practice of law for a period of five years, *nunc pro tunc* as of April 10, 1965.

BELDOCK, P. J., CHRIST, BRENNAN, RABIN and HOPKINS, JJ., concur.

APPENDIX E.

Statutes and Rule.

Rule 7

Prohibition of communication with adverse party.

No attorney shall communicate directly or indirectly upon the subject of any pending claim or action with an adverse party plaintiff or defendant known to him to be represented by attorney without the latter's knowledge and consent, nor shall he permit any claim agent or other representative of his client to interview an adverse party plaintiff or defendant or obtain any statement from him, or make any settlement with him without the knowledge and consent of the latter's attorney.

Section 90, Judiciary Law, subdivision 2.

The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

APPENDIX F.

Notice of Motion.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

IN THE MATTER

of

SAMUEL GREASON,

Petitioner,

against

LANDON ZUCKERMAN and SAM HABER,

Respondents.

SIR:

Please Take Notice that upon the annexed affidavit of Sam Haber, sworn to the 19th day of June, 1967, and upon all pleadings and proceedings heretofore had herein, the undersigned attorney for the respondent, Sam Haber, will move this court at a stated term thereof, to be held at the courthouse, 45 Monroe Place, Brooklyn, New York, on the 26th day of June, 1967, at 2:00 p.m. or as soon thereafter as counsel can be heard for an order dismissing this proceeding upon the grounds set forth in the aforesaid affidavit, to disaffirm the findings and report of the referee

so far as applicable, and for such other and further relief as to the court may seem just and proper.

Dated: New York, New York
June 19, 1967.

Yours, etc.,

EMANUEL REDFIELD
Attorney for Respondent, Sam Haber
Office & P. O. Address
60 Wall Street
New York, New York 10005

To:

Harold M. Spitzer, Esq.
Attorney for Petitioner
821 Franklin Avenue
Garden City, New York

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

IN THE MATTER

of

SAMUEL GREASON,

Petitioner,

against

LANDON ZUCKERMAN and SAM HABER,

Respondents.

State of New York,
County of New York, ss:

SAM HABER, being duly sworn, says:

That he is one of the respondents in this proceeding and makes this affidavit in opposition to petitioner's motion and in support of this motion to dismiss this proceeding and to disaffirm the referee's findings and report as to charges 5B, 5F and 5H on the following grounds:

1. That the evidence which forms the basis of the findings and report of the referee was derived from testimony and records coerced from the respondent and his law partner, Landon Zuckerman, in violation of his rights and privileges under the Constitution of the United States, the Fifth and Fourteenth Amendments thereof.

2. That Section 90, Subd. 2 of the Judiciary Law insofar as same empowers the Supreme Court to censure, suspend from practice and remove from office an attorney and counsellor-at-law for "professional misconduct" or

"malpractice" or "conduct prejudicial to the administration of justice" is vague and uncertain and violative of respondent's rights under the Constitution of the United States.

3. This court, in directing by its order of January 21, 1957, as amended by its order of February 11, 1957, a judicial inquiry and investigation (*Matter of M. Anonymous v. Arkwright,* 5 A. D. 2d 790), and then sitting in judgment on the charges has denied this respondent of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. And due process requires as a minimum that a tribunal other than this court hear and determine the charges involved.

4. Special Rule 7 of this court is not applicable to the facts with respect to this respondent.

5. The application of said Rule 7 to this respondent is a denial of due process of law, is *ex post facto* in violation of the Constitution of the United States.

6. The report of the referee fails to separate the evidence as to the charges against this respondent and therefore the charges are not supported as to respondent Sam Haber.

The legal questions involved are the subject of a separate brief.

This affidavit shows the following facts: This proceeding is a culmination of a judicial inquiry and investigation ordered by this court by its order dated January 21, 1957, as amended by its order dated February 11, 1957. On or about November 29, 1960 and again on April 24, 1961 the Judicial Inquiry served subpoenas *duces tecum* to be served on respondents, demanding they appear and produce records. On February 24, 1961 the Judicial Inquiry wrote a letter to them demanding additional files. The records were produced and respondent Haber testi-

fied. Deponent testified and produced the records because he had no choice. The order of this court in *Cohen v. Hurley* dated December 31, 1959, which was affirmed by the Supreme Court of the United States on April 24, 1961 warned respondent that if he failed to comply he would be disbarred. Because of the fears and peril, the respondent complied.

All the evidence before the referee are from testimony or records supplied by respondent or by respondent Zuckerman, his partner, or from leads furnished by such testimony and records. The evidence therefore is tainted with constitutional infirmity. Reference is made to the subpoenas, the letter, the records, the testimony, the findings and report of the referee and incorporated herein. In the event of any doubt, it is requested that a hearing be held on this subject, for the purpose of exploring these facts in detail (it appears, however, that the claims herein are beyond cavil).

WHEREFORE, it is respectfully requested that this proceeding be dismissed, the report of the referee be disaffirmed as to charges 5B, 5F and 5H and that the motion of petitioner be denied.

SAM HABER

Sworn to before me this
19th day of June, 1967.
EMANUEL REDFIELD
Notary Public, State of New York
No. 03-3224800
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1969

APPENDIX G.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

IN THE MATTER

of

LANDON ZUCKERMAN and SAM HABER, Attorneys.

SAMUEL GREASON,

Petitioner,

LANDON ZUCKERMAN and SAM HABER,

Respondents.

SIR:

Please Take Notice, that upon the annexed affidavit of Landon Zuckerman, duly sworn to the 17th day of June, 1967, and the proceedings heretofore had herein, the undersigned will move this Honorable Court at a Term for Motions thereof, fixed by the Court to take place at 2:00 P. M., on June 26, 1967, at the Courthouse, 45 Monroe Place, Brooklyn, New York, or as soon thereafter as counsel can be heard, for an order granting the following relief:

(1) Directing that such proceedings be instituted as will correctly set forth the status of and who the petitioner is in the present proceeding; and,

(2) Dismissing the petition against the said Landon Zuckerman; or in the alternative, and if the petition not be dismissed,

(3) Remanding this proceeding to a Department other than the Second Department; or in the alternative, and if the matter not be remanded,

(4) Referring the proceeding for hearings *de novo* on the remaining charges outstanding against the respondent, namely, charges 5B, 5F and 5H,

and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.
June 16, 1967

Yours, etc.,

EIBER, OKIN, RAFSKY & FELDMAN
Attorneys for Respondent, Landon Zuckerman
Office & P. O. Address
350 Fifth Avenue,
New York 1, N. Y.

To:

Harold M. Spitzer, Esq.,
Chief Counsel to Judicial Inquiry on
Professional Conduct,
821 Franklin Avenue,
Garden City, N. Y.

SUPREME COURT OF THE STATE OF NEW YORK,

APPELLATE DIVISION—SECOND DEPARTMENT.

IN THE MATTER

of

LANDON ZUCKERMAN and SAM HABER, Attorneys.

SAMUEL GREASON,

Petitioner,

LANDON ZUCKERMAN and SAM HABER,

Respondents.

State of New York,
County of New York, ss:

LANDON ZUCKERMAN, being duly sworn, deposes and says:

I am the respondent in the above entitled proceeding, and make this affidavit in support of the relief set forth in the Notice of Motion, namely:

(1) Directing that such proceedings be instituted as will correctly set forth the status of and who the petitioner is in the present proceeding; and

(2) Dismissing the petition against the said Landon Zuckerman; or in the alternative, and if the petition not be dismissed,

(3) Remanding this proceeding to a Department other than the Second Department; or in the alternative, and if the matter not be remanded,

(4) Referring the proceeding for hearings *de novo* on the remaining charges outstanding against the respondent, namely, charges 5B, 5F, and 5H.

This motion is made in the present form pursuant to the notification contained in the letter of Hon. Herman M. Pogul, dated June 9, 1967.

I come to the Court after two years of suspension. So far as I know, no attorney has ever faced so drastic an additional period of suspension on charges so unsupported by evidence—tainted or otherwise. In considering the motion, I would ask that this Court also consider whether this nightmare might not now be ended so that I may go in peace to earn a living for my family.

For purposes of convenience, the respective sections of this omnibus motion are treated separately.

1.

CORRECTION OF THE STATUS OF THE PRESENT PROCEEDING.

Hon. Samuel Greason (the original prosecutor of the above proceeding), is no longer associated with the Judicial Inquiry in Nassau County. Throughout the proceedings, Judge Greason appeared both as petitioner and as counsel to the petitioner. No notice of substitution of counsel has ever been received by the respondent or his attorneys, nor has any substitution of petitioner been made.

Under the circumstances, it would appear appropriate that such proceedings should be undertaken as will regularize the within proceeding so as to avoid the necessity of dealing with a petitioner who has long been withdrawn from this proceeding and the complications which may arise as a result thereof.

2.

THE DISMISSAL OF THE PETITION.

The original order of disbarment, dated March 3, 1965, and entered in the Office of the Clerk of this Honorable Court on March 11, 1965, was reversed by the Supreme Court of the United States (*Landon Zuckerman, et al., v. Samuel Greason,* ..... U. S. ....., 17 L. Ed. 2d 696, 87 S. Ct. .....).

The mandate of the Supreme Court issued on March 13, 1967.

Thereafter, and on March 20, 1967, this Court issued its order suspending the respondent for a period of five years *nunc pro tunc* as of April 10, 1965. This order was reversed by the Court of Appeals of the State of New York in a memorandum decision dated June 1, 1967, upon which the remittitur of the Court of Appeals to this Court issued.

The proceeding originally as brought against me took the form of an investigation authorized by this Honorable Court and conducted by the Judicial Inquiry of Nassau County. In the course of that inquiry subpoenas were served and my attendance compelled before the Judicial Inquiry in aid of the investigation being conducted by that body. The record before this Court is amply clear that I appeared many times before the Judicial Inquiry at its offices, produced many files and answered many questions. In substance, I was compelled by the very existence of the Inquiry and the authority which it claimed and which it exercised, to testify and supply evidence against myself.*

* The record does disclose that innumerable files were inquired into by the Inquiry (Transcript, page 440). Appellant and his partner were interrogated by the Inquiry at some eleven sessions (Transcript, pages 450-451) and those eleven sessions did not include interrogation by telephone and before Mr. Justice Gulotta long before any charges were brought (Transcript, pages 450-451). The Inquiry demanded and received files, records and papers which were produced to and copied by the Inquiry, including financial records (Transcript, pages 452-453, 454-455, 455-457, 468-469, 578-580).

The answers made to the Inquiry by me were used against me in the course of the disciplinary proceeding. In addition, the documents produced by me were used against me in the disciplinary proceeding. Basically, the charges against me were premised in substantially greatest part on the evidence supplied by me and from my files.

The all pervasive scope of the unlimited inquiry conducted by the Judicial Inquiry can be illustrated by only one small area of the Inquiry's interest. On all of the cases involved, in Charge 5-B, the evidence came from or directly flowed from evidence supplied by me from my files subpoenaed by the Inquiry. That charge concerned itself with Messrs. Zimmer, Pound, Schliesman, Alexander, Erikson, Pasqua and White (see letter of February 24, 1961, annexed hereto).

The minutes of the Inquiry's proceedings shows as an example, that from the Erikson file alone (which I supplied to the Inquiry), *eighteen* separate documents were submitted to Judge Gullata (see Pet. Ex. 800 of 4/7/61—an Inquiry exhibit number prior to any proceedings against me).

In the course of its inquiry into my handling of cases involving infants, the Inquiry subpoenaed *several hundred* files and took those papers therefrom that it desired.

The Inquiry's letter of February 24, 1961, a copy of which is submitted herewith, shows one of the instances where the Inquiry demanded and received *46* files.

From the documents obtained by the Inquiry under its then unlimited power of subpoena, all of the charges against me were developed. No matter that ultimately the Referee found it all simmered down to little. Even the little came from me and from my partner.

It follows from the foregoing that the Inquiry, however well founded as an investigation, could not properly thereafter first compel me to testify against myself and produce documents against myself, and then use that testimony and

those documents to support a disciplinary proceeding against me. This has now been settled by the Supreme Court of the United States in my own case.

For the reasons hereinbefore set forth, it is respectfully submitted therefor that the present proceeding against me must be dismissed.

3.

REMANDING THE PROCEEDING TO A DEPARTMENT OTHER THAN THE SECOND DEPARTMENT.

Assuming, for purposes of this motion, that this Court will not dismiss the petition against me, I would most respectfully point out that the view of me held by the Court, as expressed in the order of March 20, 1967, suggests that this proceeding has lasted so long and the atmosphere which surrounds it is such as to warrant its transfer to another Department.

An analysis of the evidence against me, both tainted and untainted (if any of the latter can be said to exist), clearly shows that there is no evidence *as a matter of law* to sustain the remaining charges against me.

Before addressing myself to the remaining charges, I would most respectfully point out to the Court that in a recent case (*Matter of Sgarlato,* ..... A. D. 2d ....., 277 N. Y. S. 2d 318), where the offenses charged were far more numerous and serious, this Court suspended an attorney for two years, not five. I have already been suspended for more than two years and at this juncture appear to be at risk for three more years, and I was not found guilty of any offenses involving money fraud, conflict of interest, giving false and perjurious testimony, etc., etc. In essence, I have been effectively disbarred, for not only has this Court felt that I should be suspended for five years,

but that my readmission shall depend upon unspecified conditions at the time of my reapplication for readmission. The finality of my disbarment has been replaced by the finality of my suspension.

Coming then to the remaining charges which have given rise to so drastic a punishment and so drastic a prospective punishment, I would most respectfully point out to the Court that the remaining three charges (and again even if the tainted evidence is included in their consideration) cannot be sustained for a complete lack of evidence to support them.

Regarding Charges 5B and 5F.

The Referee's report made no distinction between either me, my partner, or the members of our staff and office as to who, did what. The charges were simply held sustained as against us with nothing in the Referee's report or the opinion of this Court (23 A. D. 2d 825, 259 N. Y. S. 2d 963) to show what the Referee or this Court found that I had done. No act or acts of misconduct by me, or my partner, for that matter, were found by the Referee.

The record of the hearings before the Referee shows that my partner and I testified to a complete lack of knowledge of any impropriety in the handling of bills of particulars or referrals to specialists for consultation and Judge Greason stipulated as follows:

> "It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the petitioner does not intend to raise any issue as to the testimony of the respondents regarding their office procedures in connection with the preparation and verification of bills of particulars and examinations before trial."**

** Appellant and his partner had testified that they did not personally prepare bills of particulars; that this was a function of others in the office.

There was no evidence of any wrongdoing on my part.

With regard to Charge 5F, Judge Greason stipulated before the Referee, at pages 951-952 of the transcript, that:

> "We recognize, of course, that in any negligence case the attorneys for the plaintiff, if they think it is advisable, have the right and duty to send their patients to specialists, orthopedists, neurologists and whatnot, if the facts in the particular case seem to indicate that it is proper."

Although the Inquiry produced evidence that *in only 13* cases out of more than 800 cases handled, appellant's law firm had referred clients to medical specialists for evaluation, the Inquiry didn't even attempt to prove that such referral was other than perfectly proper. As a matter of fact, the evidence that I never attempted to influence the conclusions or findings of any specialists, never requested a specialist to modify his report, and never sent a client to a specialist to build up medical bills, is completely uncontradicted on the record.

With regard to Charge 5B, there was absolutely no evidence that any medical bills were false, let alone known to me or my partner to be false. There was no evidence that I ever knowingly submitted a false bill of particulars or lost earnings statement in the course of litigation.

In not a single aspect of the two charges, did the Referee's report find any improper conduct on my part or that of my partner. Certainly no acts of moral turpitude were even suggested.

Charge 5H.

Although this charge contained many specifications, the Referee considered only that aspect dealing with "adversary statements" and the charged violation of Special Rule 7 (Referee's report pp. 52-55).

In dealing with that charge and although the alleged adversary "party" statements were taken by respondents' investigator without instructions from me or my partner or any employee of our firm so to do, and although the statements were taken long prior to the adoption of Special Rule 7 (the rule adopted July 1, 1960) and, without exception, all statements were taken before any claim had been asserted or any action had been started and the statements for the most part were the oral statements of *witnesses* reported by the investigator and not of parties, the Referee found that Special Rule 7 applied and that, contrary to its specific language, it applied to witnesses as well as to parties and that it applied even though the alleged violations occurred long prior to July 1, 1960. This Honorable Court confirmed this finding though it flew in the face of its own rule.

All of the foregoing is premised upon the assumption that all of the evidence used by the Referee and this Court was properly obtained. When it is considered that there were 161 exhibits, almost all of which either came from or were the consequence of information disclosed by our files, it becomes manifestly clear that it would be almost humanly impossible to reconsider this matter on such evidence as might properly remain unaffected by the tainted evidence. There were 1884 pages of testimony which was taken over fifteen days of hearings and the greatest portion of this testimony derived from information disclosed by me, by my partner Sam Haber, and by records from our office. Couple this to the exhibits and it becomes clear that this Court having at least twice considered my alleged misconduct would be asked now to ignore and forget everything that it heard about me in reaching a determination. I respectfully submit that it would be impossible for this Court to do this, and it is for this reason that the matter should be heard by some other body who could approach it with a fresh mind.

This of course brings me to a discussion of my next point in support of the request that the proceeding be remanded to a Department other than the Second Department.

It is undisputed that the decision to prefer charges against me resulted from an inquiry into my conduct which, in turn, resulted in a report to this Department which must, of necessity, have contained much that was palpably untrue. The Referee dismissed most of the charges against me. Those charges were supported by witnesses such as Bernstein, who turned out to be provable liars. This Court, of course, at the time of the inquiry into my affairs was in its investigative phase, was in no position to know whether the perjurious evidence given against me was in fact perjurious, and so it took the decision to authorize that charges be brought against me.

I do not impugn the motives or good faith of this Court in acting as it did, but I do respectfully draw the Court's attention to the fact that when it authorized charges against me, this Court was acting as investigator and prosecutor, and was doing so in the belief that I was a scoundrel—a belief fostered by the false testimony against me.

Some of the charges which the Referee later dismissed out of hand, were, when made, so outrageous that it would be unreasonable to ask that the Court or anyone hearing those charges in the first instance, not be affected by them.

When this Court came to consider the Referee's report, the atmosphere created by the original false evidence must have lingered for the punishment meted out was extraordinarily severe.

Thus, when this Honorable Court came to judge me, it judged me after having been both investigator and prosecutor, and if it judged me severely this, too, was understandable, for certainly some of the witnesses who were later disclosed to be completely untruthful made statements which would have affected anybody.

The Supreme Court of the United States has held on a number of occasions that a court should not be investigator and prosecutor and judge in the same case. To avoid any suggestion that any of the old and falsely malodorous atmosphere might still linger, I respectfully request that this matter be remanded to a court to whom the name Zuckerman is meaningless, who will come upon the evidence fresh and unaffected by vile accusations it will not have heard.

4.

A HEARING *DE NOVO*.

As was previously pointed out, the time to be spent in winnowing out from the thousands of pages of testimony and the hundreds of exhibits, that which is tainted against that which is untainted, would require an almost superhuman effort. Not only would a referee have to analyze whether a specific bit of evidence was properly obtained, but would also have to determine whether other evidence, either by way of exhibit or by way of testimony, flowed from initially tainted evidence.

It is respectfully submitted that the quickest and most efficient way of handling the situation should this Honorable Court not grant the relief hereinbefore requested, would be to require the petitioner to come forward with whatever independent evidence he has against me and allow a referee then to report to this Court on his findings with regard to such independent evidence.

If my suggestion is followed, then there will be avoided the endless argument and bickering on whether evidence was tainted or flowed from tainted evidence, etc., etc., etc. A clean record will then be before the Court and the facts will then be reviewed without any suggestion, suspicion or appearance of impropriety.

For the reasons hereinbefore set forth, it is respectfully submitted that the proceedings be corrected; that the petition be dismissed, or if the petition not be dismissed, that the matter be remanded to another Department for hearings *de novo*.

It has not been my intention or desire to impede the administration of justice. My duties as President of a Yeshiva, U.J.A. Chairman, and member of the governing board of my Temple, has made me acutely aware of the circumstances surrounding the Nazi holocaust which destroyed six million of my people, and instilled in me an overwhelming compulsion to protect all our constitutional rights in the United States.

If my zeal and fervor has offended this Court, I apologize. My family and I have certainly suffered, and I humbly ask this Court's compassion in reaching its decision.

LANDON ZUCKERMAN

Sworn to before me, this
17th day of June, 1967
LEONARD FELDMAN
Notary Public, State of New York
No. 30-6261750
Qualified in Nassau County
Cert. filed in New York County
Commission Expires March 30, 1968

APPENDIX H.

(See opposite page.) ☞

APPENDIX "H"

The People of the State of New York

To: Landon Zuckerman and
Sam Haber

GREETING:

We command you, That all business and excuses being laid aside, you appear and attend before HONORABLE FRANK A. GELETTA, a Justice of the Supreme Court of the State of New York, at an ADDITIONAL SPECIAL TERM OF THE SUPREME COURT FOR THE COUNTY OF NASSAU, at Room Number 309 Judicial Facility, 521 Fulton Ave. Garden City, N.Y. New York, on the 6th day of December 1960 at 10:00 o'clock in the forenoon, and at any adjourned date to testify and give evidence in a certain proceeding now pending in the said Court, then and there to be conducted, consisting of a Judicial Inquiry, pursuant to order of the Appellate Division of the Supreme Court of the State of New York, for the Second Department, dated April 13, 1960, as amended, with respect to all matters relative thereto, and that you bring with you, and produce at the time and place aforesaid

all paper or papers, file or files, relating to the claim or claims, action or actions, pertaining to the following named person or persons, infant or infants:

Richard, Helen and Barbara Lang
Frank Martinis and Raymond Jayeete
Esther, Joseph, Vincent, John, Joanne Cieciare
Irving and Cheryl Cohen
Celia, Eugene and Herman Korn
Averill Flax
Sherrie and Jane Weisman
Geraldine Roth
Roger J. Gessle, Beatrice Gessle
Daniel, Reita and Lynn Klausner
Anna and Irwin Khausner
Jack and Ida Fleishman
Harvey, Sallie, Helene, Jeffrey and Mona Weingarten
Nicasio, Ida L and Maria L. Padilla
Gerardo Rodrigues
Charles Orlando
Harry, Ella and Theodore Hanson
John Powers
Elizabeth, Susan and William Ryan
Dorothy Hargreaves, Gertrude Hargreaves
Virginia Reidy, James P. Reidy
Lora Brown and Justin Brown
Felix J. Elizabeth, Nancy and John Rufrino
Cecile, Harvey and Alison Ross
Ruth, Frederick J. and Susan Goldenberg
(See attached list for additional names)

now in your custody, and all other deeds, evidences and writings which you have in your custody or power, concerning the premises, and for a failure to attend you will be deemed guilty of contempt of Court and liable to pay all losses sustained thereby, and forfeit FIFTY DOLLARS in addition thereto.

Frank A. Geletta

Witness, HONORABLE [redacted], one of the Justices of the Supreme Court, presiding at the said Additional Special Term thereof, at said County Court House, Mineola, New York, on the 29th day of November 1960

Pamela A. Anderson

CLERK

of the JUDICIAL FACILITY
Garden City, N.Y.
on December 6, 1960 at 10:00 AM

TEXT IS POOR

[illegible] C. Dharun and Herman Rosenbush
Robert Loretta, Jr and MaryANN Loretta
Dorothy, Charles, Michael and Charles Setturne
Anita Klausner and Lynn Klausner; Ida Fleishman
[illegible] and Murray [illegible]
Pauline and Donald Mahan
Wesley E and William H. Stillwagon
Donald Paul and Donald A. Mulett
Paul, Tilly, Marlene and Jeri Lynn Barkow
Rose J. Eichmuller, Ernest J. and Edward Eichmuller
Peter, Carol Ann and Linda Baglio and Mary Shea
Edward, Beth and Eleanor Zimmer
Albert Stanley, Selma, Karen and Cynthia Zimmer
Andree, George and Evelyn Gonsowski
Joseph Wm. and Susan Gelosi
Virginia, Victor and Angelina Muto
Phyllis and David Friedman
Frances, Joanne and William Gunneen
Frank and Richard Miller
Francis and Pasquale Messina
Terry, Myra and Alfred Apter
Ida, Louis and Angelo Pasqua
Stephen and Jack K. Sinagra
Michael Sheehy and Ann S. Sheehy
George D. Owik, Ida Owik and Annette Arcati
Fonda Schwerinske, Carl and Angela Schwerinske
Walter M, Patricia A. and John W. Sharkey
Mitzie and Michael Dinnard
William and William A. Gunneen
Linda Ann and Edward Powers
Alice and Thomas McNally
Henry and George Bruggeman
Barbara Joan Schneider, Ben Schneider
Ruth, Irving and Mitchell Frankel
Nina S. and Jerry M. Katz
Luciano Pedrocno
Rose, Maxene and Linda Halpern
Robert, Evelyn and Ellen and Jail Book
Anthony Perno and Virginia Perno
Mary, Salvator and Carol Ann Baglio
Selma, Stanley, Anna, Richard and Karen Zimmer
Boris, Fred and Stewart Sherman
Mary, Salvatore, Peter, Linda and Barbara Baglio
Bruce and VanJack Sirkus
Lester, Edna, Sheryll and Joel D. Solomon
Vincent, Lucy and Emilia Giordina
Charles, Ruth, Susan, Victoria and Margot Berger
Kenneth Siegel and Roslyn Siegel
Glenda and John Siegel
Johanna Joan, Deborah Lynn, Darrell, Jr and Darrell Haling
Dominick and Antonio Evangelista
Gordon Glynn and Gordon Cottrill
Josephine and Geraldine Barbara
Frank, Anna and Paula Gentile
Andrea and Josephine Reina
Tony and Frank Angliseno
Frances, Patricia Ann and Lynne E. Tenke
Mitha, Raymond and Robert Scherdel
Albert and Robert DeTota
Mary and Salvatore Baldinucci
Arthur and Rebecca [illegible]
Thomas G. Fuller, Michael and Helen Riggo
Harry Goldman and Martin Goldman
John, Mary, and Rosemary Guerriero

Martin F and Bernard R. Schaeker
Saundra and Lawrence Libonati
Joanne and Rose Buckwalter
Evelyn and George Gonsowski and Andree Fucci
Susan and Ruth Berger
Winifred and Jacqueline Bosworth
Clara, Myra and Louis Marcus
Donald and Gerardo Tripoli
William S. Annie J. Calvin, Kenneth, Roger, and David Powell
Robert and William Tripoli
Chester J. Dorothy and Susan Walsh
Donald M. Macchio and Ann Russo
George and Lucille Hepworth
David and Andrew Salano
Wendy Sue and Hartley Levenberg
Lawrence P. and Loretta B. Napolitano
Theresa and Michael Napolitano
Joseph and Thomas Caputo
Nancy Fisher
George R. and Florence Klevicki
John Slepko, Jr.
Eugene Daniel and Roger Speckman
Benson, Jayne and Morton Weintraub
Eugene, Janet and Pamela Currier
George J. and Richard Appilnick
Olga and June Forte
Stuart and Edward Wollman
Paul J. Schoenfield and Patricia T. Ore and/or Carol
Richard Notturno Jr. Richard Notturno, Sr.
Marcia Sternberg and Beth or Bertha Sternberg
Alan and Melvin Jort
Celeste and Dorothy Calbi
Maurilio, Doris, Cathy and Frank Huerta

Fannie & Harold Kirshner
Judith Kirshner and Harold Kirshner
Charles Daniel and Charles Lacey
Herbert and Jary Lohr
Steven and Jack Dubowsky
Jack Dubowsky and Nathan Dubowsky
Edward, Elaine, Steven and Donna Turchin
Dorothy Hart and Lisa Swain and/or Lisa Sawin
Phyllis L. Thomas, Frances and Thomas Izzo Jr.
Pauline L. Frank, Paula and Frank Scappatura
Whirley, Cecil and Harriet Moseley
Linda Pezzuoli
Pauline and Joseph Mahas accident May 20, 1955
Pauline and Joseph Mahas accident Feb. 11, 1955

The People of the State of New York

TO

Landon Zuckerman and Sam Haber, Esqs.

GREETING:

We command you, That all business and excuses being laid aside, you appear and attend before HONORABLE EDWARD ROBINSON JR., a Justice of the Supreme Court of the State of New York, at an ADDITION [redacted] TERM OF SAID COURT FOR THE COUNTY OF NASSAU, at Room Number 310c, 3rd floor, New County Court House, Old Country Road, Mineola, State of New York, on the 28th day of April, 19 61, at 11:00 o'clock, in the forenoon, and at any adjourned date to testify and give evidence in a certain proceeding now pending [redacted] said Court, then and there to be conducted, consisting of a Judicial Inquiry, pursuant to order of the Appellate Division of the Supreme Court of the State of New York, for the Second Department, dated April 13, 1959, as amended, with respect to all matters relative thereto, and that you bring with you, and produce at the time and place aforesaid, a certain

[redacted]

The following listed files:

Adele Shimkus and Charles Shimkus

Alan Erickson - Mary Ann Erickson

William Tochterman

Martin Alexander

Frank Pinto

Zimmer vs. Garcia

Ida Pasqua and Angela Pasqua(Infant)

William Paolillo

Edward Pound

Edgar Schleissman

now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises, and for a failure to attend you will be deemed guilty of contempt of Court and liable to pay all damages sustained thereby and forfeit FIFTY DOLLARS in addition thereto.

Witness, HONORABLE EDWARD ROBINSON JR. [illegible] the Justices of said Supreme Court, presiding at the said Additional Special [redacted] County Court House, Mineola, New York, on the 24th day of April, 19 61.

Francis Anderson

SAMUEL GREASON
COUNSEL FOR THE JUDICIAL INQUIRY
ROOM 310C, 3RD FLOOR, NEW COUNTY COURT HOUSE
OLD COUNTRY ROAD
MINEOLA, N. Y.

IT IS HEREBY STIPULATED that, the above matter having been adjourned to the [redacted] day of [redacted] 19 , the undersigned Witness is hereby excused from attending on said date but agrees to remain subject to the call of the Counsel for the said Judicial Inquiry.

Dated 19

TEXT IS POOR

The People of the State of New York

TO

London Zuckerman and Sam Haber, Esqs.

GREETING:

We command you, That all business and excuses being laid aside, you appear and attend before HONORABLE EDWARD ROBINSON JR., a Justice of the Supreme Court of the State of New York, as an ADDITIONAL Special Term for THE COUNTY OF NASSAU, at Room Number 310c, 3rd floor, New County Court House, Old Country Road, Mineola, State of New York, on the 28th *day of* April *, 19* 61 *at* 11:00 *o'clock, in the fore noon, and at any adjourned date to testify and give evidence in a certain proceeding now pending in said Court, then and there to be conducted, consisting of a Judicial Inquiry, pursuant to order of the Appellate Division of the Supreme Court of the State of New York, for the Second Department, dated April 13, 1959, as amended, with respect to all matters relative thereto, and that you bring with you, and produce at the time and place aforesaid, a certain*

stub or stubs pertaining to checks, covering the years 1957, 1958 and 1959, of the law firm of Zuckerman & Haber.

all book or books, record or records, stub or stubs, pertaining to financial records, covering the years 1957, 1958 and 1959 of the law firm of Zuckerman & Haber.

now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises, and for a failure to attend you will be deemed guilty of contempt of Court and liable to pay all damages sustained thereby and forfeit FIFTY DOLLARS in addition thereto.

Witness, HONORABLE EDWARD ROBINSON JR., one of the Justices of said Supreme Court, presiding at the said Additional Special Term thereof, at said County Court House, Mineola, New York, on the 24th *day of* April *, 1961*

Frank A. Gulotta

Francis Anderson
Clerk

SAMUEL GREASON
COUNSEL FOR THE JUDICIAL INQUIRY
ROOM 310C, 3RD FLOOR, NEW COUNTY COURT HOUSE
OLD COUNTRY ROAD
MINEOLA, N. Y.

IT IS HEREBY STIPULATED that the above matter having been adjourned to the day of 19 , the undersigned Witness is hereby excused from attending on said date but agrees to remain subject to the call of the Counsel for the said Judicial Inquiry.

Dated: 19 .

Enforcement of process in Civil Practice Act § 402:
If Witness is found by this Subpoena to appear at the hearing or examination and at any adjourned date thereof.

Judicial Inquiry
ADDITIONAL SPECIAL TERM
SUPREME COURT, NASSAU CO.
SAMUEL GREASON
Chief Counsel

February 2[illegible], 1961..

Buckerman & Habor,
Mineola, N.Y.

Gentlemen:

We request that you supply us with your files on the following:

Freida Moskowitz	Ida Pasqua	William Utley
Elizabeth Virgilio	Stephen Failer	Adelaide Suhimkes
Grard J. Turner	Geraldine Conklin	Macchio
Joseph Jl Cutter	Shirley Moseley	Mary Baglio
Aaron Lockhard	Michelene Kohn	Kirshner
Dorothy Hart	William Tochterman	Michael Caputo
Westmore Marr	Thomas Pace	O'Brien (Nov.17,1957)
Edward Harris	Martin Alexander	A.Feldman (Oct. 18,1957)
Carolyn Goldschmidt	Edward Pound	Ann Smith (June 20,1958)
John Ranieri	Edgar Schleissman	Charles Weisensoll Nov.
Edna Faber	William Paolillo	Ronald Murroll
Jeanne Greene	Irving Schnapp	Adaskos
Mary Ann Erickson	Agnes Magliocchi	Louis Chernakoff
John Pinto	The Riley Family	Adamo
Fred Schick	John Young	Umberto Gardi
Carlos Gardi		

Thank you for your cooperation.

Very truly yours,
Judicial Inquiry
Stephen M. Byrnes.

APPENDIX I.

Judgment of Court of Appeals.

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of October in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

WITNESS,

The HON STANLEY H. FULD, Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

Remittitur October 31, 1967.

2. No. 407. 67

IN THE MATTER

of

LANDON ZUCKERMAN and SAM HABER, Attorneys.

SAMUEL GREASON,

Respondent,

LANDON ZUCKERMAN and SAM HABER,

Appellants.

BE IT REMEMBERED, That on the 8th day of September in the year of our Lord one thousand nine hundred and sixty-

seven, Landon Zuckerman and Sam Haber, the appellants in this cause, came here unto the Court of Appeals, *pro se,* and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Samuel Greason, the respondent—in said cause, afterwards appeared in said Court of Appeals by Harold Spitzer, attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Emanuel Redfield, of counsel for the appellant Haber, and by Mr. Landon Zuckerman, as appellant *pro se,* and by Mr. Harold M. Spitzer, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced

according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, October 31, 1967.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

(Seal.)

Appendix J.

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Frank Pinto and Charles Pinto	4/24/61	p. 12B	p. 21
William Tochterman and Dorothy Tochterman	4/21/61	p. 12B	p. 22
Eloise Utley	2/24/61	p. 12C	p. 23
Jeanne Greene	2/24/61	p. 12C	p. 23
Thomas Pace	2/24/61	p. 12C	p. 24
Elizabeth Virgillo	2/24/61	p. 12C	p. 24
Salvatore Baldinucci and Christine Baldinucci	11/29/61	p. 12E	p. 25
Carlo Gardi	2/24/61	p. 5, 12E	p. 31
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Alan Erickson and Mary Ann Erickson	4/24/61	p. 12B	p. 41
Mrs. Joseph Riley, Patricia Riley, Kenneth Riley	2/24/61	p. 12B	p. 21

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FILED
DEC 29 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 927

IN THE MATTER
of
LANDON ZUCKERMAN and SAM HABER,
Petitioners,
against
SAMUEL GREASON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD M. SPITZER,
Chief Counsel,
Judicial Inquiry on
Professional Conduct,
Attorney for Respondent,
821 Franklin Avenue,
Garden City, N. Y. 11530.

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In Re Haber, — U.S. —, 87 S. Ct. 1016 10

In Re Kreisel, 250 N.Y.S. 2d 250 9

Kaye v. *Co-ordinating Committee on Discipline*, — U.S. —, 87 S. Ct. 848 10

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Matter of Stanley Louis Pines, 26 A.D. 2d 424 9

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 927

IN THE MATTER

of

LANDON ZUCKERMAN and SAM HABER,
Petitioners,

against

SAMUEL GREASON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statutes and Rules Involved

Judiciary Law, State of New York, Section 90, subdivisions 2, 6 and 7:

> "2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is

guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice. ***"

"6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at anytime within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and counsellor-at-law must be allowed to defend himself against such charges. ***".

"7. It shall be the duty of any district attorney within a department, when so designated by the presiding justice of the appellate division of the

supreme court, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said presiding justice may, in a county wholly included within a city or in a county having a population of over three hundred thousand inhabitants, appoint an attorney and counsellor-at-law, designated by a duly incorporated bar association approved by him, to prosecute any such proceedings and, upon the termination of the proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered under such designation, which compensation shall be a charge against the county specified in his certificate and shall be paid thereon."

Canons of Professional Ethics, Canon 9 (Appendix to New York Judiciary Law):

"9. Negotiations with Opposite Party

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

Special Rules of the Appellate Division, Second Department in Regard to Conduct of Attorneys, in effect January 1, 1940:

"Rule 5

Preservation of records of actions, claims and proceedings.

In every action, claim and proceeding of the nature described in rule three, attorneys for all the

parties shall preserve the pleadings, records and other papers pertaining to such action, claim and proceeding, and also all data and memoranda of the disposition thereof, for the period of at least five years after any settlement or satisfaction of the action, claim or proceeding or judgment or final order thereon, or after the dismissal or discontuance of any action or proceeding brought."

("Rule three" mentioned refers to actions or claims arising from personal injuries or property damage, etc. under contingent fee retainer.)

Special Rules of the Appellate Division, Second Judicial Department, adopted July 1, 1960, relating to conduct of attorneys:

"Rule 7

Prohibition of communication with adverse party.

No attorney shall communicate directly or indirectly upon the subject of any pending claim or action with an adverse party plaintiff or defendant known to him to be represented by attorney without the latter's knowledge and consent, nor shall he permit any claim agent or other representative of his client to interview an adverse party plaintiff or defendant or obtain any statement from him, or make any settlement with him without the knowledge and consent of the latter's attorney."

Statement

In March or April of 1960 the Petitioners were informed by the Judicial Inquiry that it was interested in checking into certain aspects of their negligence practice. This was before any disclosures were made by the Petitioners. At that time the Petitioners stated to the Inquiry that they wished to cooperate in furnishing the desired information. Thereafter, from time to time, informal interviews were had and certain files and records were produced, either in response to letters or subpoenae, all without objection. (See transcript of testimony, pp. 570-572.) This continued until about May, 1961 when the Petitioner Zuckerman refused to continue an inspection of certain financial records and asserted his constitutional privilege (transcript of testimony, pp. 74, 75).

Eventually charges in disciplinary proceedings were filed against Petitioners, hearings held before a Referee, and finally, the Appellate Division, on March 3, 1965, disbarred the Petitioner Landon Zuckerman and suspended the Petitioner Sam Haber from the practice of law for a period of five years (23 A.D. 2d 825). The charges on which findings of guilt were made by the Appellate Division against both Petitioners were as follows:

> "5B. The respondent *** has submitted misleading, exaggerated and false medical bills and statements covering lost time and earnings for the purpose of inducing various insurance companies to part with money in reliance thereon."
>
> "5F. The respondent *** has built up medical bills for submission to insurance companies by referring claimants to a succession of doctors, orthopedists, neurosurgeons, etc."
>
> "5H. The respondent *** has improperly and in violation of the Canons of Ethics used investigators

to sign up retainers, to obtain adversary statements from parties represented by attorneys, and by having blank guardian ad litem forms signed by claimants."

In addition, Petitioner Landon Zuckerman was found guilty of charge 5A:

> "The respondent has deliberately refused to cooperate with the Court in its efforts to expose unethical practices and in its efforts to determine whether he has committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the bar."

A motion for leave to appeal to the Court of Appeals was denied July 9, 1965 (16 N.Y. 2d 482). On February 13, 1967 the United States Supreme Court granted certiorari, vacated the order of the Appellate Division and remanded the case to that Court "for reconsideration in light of *Spevack* v. *Klein,* 385 U.S. 511" (386 U.S. 15). The mandate of the Supreme Court stated that this was done in order that such proceedings might be had "as accord with right and justice, and the Constitution and laws of the United States". On March 20, 1967 the Appellate Division, without notice to Zuckerman or Haber, or opportunity to them to be heard, dismissed charge 5A against Zuckerman and sustained charges 5B, 5F and 5H against both. That was the same disposition which had been made by the Appellate Division before review by the Supreme Court, except that charge 5A was dismissed against Zuckerman and he, also, was suspended for five years instead of being disbarred (27 A.D. 2d 848). The Order was reversed for lack of due process in not affording an opportunity to be heard (19 N.Y. 2d 977-978).

After a hearing—no further evidence was offered—the Appellate Division entered an order on July 10, 1967 to the same effect as its order of March 20, 1967 (28 A.D. 2d 907).

Zuckerman and Haber again appealed to the Court of Appeals and by Opinion dated October 31, 1967, the Order appealed from was affirmed. It is on that decision that the present appeal is being taken to this Court.

ARGUMENT

POINT I

The Appellate Division correctly followed the mandate of the Supreme Court and reconsidered "in light of Spevack v. Klein *"—Garrity v. New Jersey was inapplicable.**

Petitioners' Questions, numbered 1, 2 and 3, and Reasons for Granting the Writ under number 1 revolve around the argument that the Appellate Division did not fulfill the mandate of this Court inasmuch as it did not apply the doctrine of *Garrity* v. *New Jersey,* 385 U.S. 500, 17 L.Ed. 2d 562. We submit that this Court directed the Appellate Division to reconsider this case in the light of *Spevack* v. *Klein,* 385 U.S. 511 (386 U.S. 15, 17 L.Ed. 2d 696, 87 S. Ct. 847). The mandate of this Court did not refer to *Garrity* v. *New Jersey,* although both *Spevack* and *Garrity* were decided on the same day, January 16, 1967. The Appellate Division proceeded to reconsider the matter "in light of Spevack v. Klein" and after reconsideration dismissed charge 5A (failure to cooperate by invoking the Fifth Amendment) against Petitioner Zuckerman and affirmed its findings of guilt against both Petitioners on the remaining charges. Although neither of the Petitioners made any objections on constitutional grounds to the production of any of the files or to the giving of testimony on which these remaining charges are based, at least in part, they now assert that such evidence was "coerced" and should be eliminated under the doctrine of *Garrity.* This despite the fact that the record indicates that both Petitioners not only made no objection to such evidence but affirmatively proclaimed their desire to cooperate.

In *Spevack* this Court decided that a lawyer could not be disbarred (or disciplined) for asserting his constitutional privilege against self-incrimination. In *Garrity*

v. *New Jersey*, 385 U.S. 500, 17 L.Ed 2d 562, the Court stated:

> "We now hold the protection of the individual under the Fourteenth Amendment against coerced confessions prohibits the use in *subsequent criminal proceedings* of confessions obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." (Italics added.)

Garrity excluded the "coerced" testimony in subsequent criminal proceedings. It does not hold, for example, that this testimony could not be used in proceedings brought to remove the corrupt policeman or in other non-criminal proceedings. It is well established that disciplinary proceedings, on the other hand, are not criminal proceedings, but are civil in nature (*Ex Parte Wall*, 107 U.S. 265, at p. 288; *Matter of Phillies*, 17 A.D. 2d 93, and cases cited therein, motion for leave to appeal denied, 12 N.Y. 2d 645). Moreover, in *Garrity* the coercion question arose because of the New Jersey statute which clearly required discharge for failure to waive immunity. There is, of course, no similar statute in disciplinary proceedings and the matter of sanctions if any to be imposed for non-cooperation vary greatly, depending on the facts of each case. See *In Re Kreisel*, 21 A.D. 2d 431, 250 N.Y. Supp. 2d p. 250, where the attorney was convicted of five charges including a charge of failing to cooperate. A one year suspension was imposed. See also *Matter of Stanley Louis Pines*, 26 A.D. 2d 424, six months suspension; *Matter of Harold F. Powell*, 23 A.D. 2d 148, 259 N.Y.S. 2d 171, one year suspension; *In Re Dwyer*, 254 A.D. 769, 4 N.Y.S. 2d 895, three year suspension.

Furthermore, there may be many reasons why lawyers, as members of an honorable profession, may choose to testify and cooperate when their professional conduct is

called into question. One of these reasons may well be the established understanding that cooperation with the Court's inquiry is a factor to be considered in mitigation.

It should also be noted that Rule 5 of the Special Rules of the Appellate Division, Second Department (*supra*) required that lawyers in contingent fee negligence cases preserve records for a period of five years. The case files and records requested of the Petitioners clearly fall within the above Rule.

As a practical matter we submit that there is no basis to infer that a lawyer, despite positive statements of the desire to disclose evidence and to cooperate was, nevertheless, acting under "implied coercion". This is demonstrated by the fact that Petitioner Zuckerman, despite the existence of *Cohen* v. *Hurley,* when it suited his purposes, refused to turn over his financial records and invoked his constitutional privilege. Futhermore, it should be noted that the disclosures that were made by Petitioner Zuckerman before he invoked his privilege, as well as the disclosures made by Petitioner Haber, did not "incriminate" nor were they thereby subjected to any criminal prosecution. The Petitioners cite *Kaye* v. *Co-ordinating Committee on Discipline,* — U.S. —, 87 S. Ct. 848, as authority for their position, pointing out that he had testified. There were, however, other issues in that case. Kaye had testified in the preliminary investigation but thereafter invoked his constitutional privilege and refused to testify before the Referee and objected to the introduction of his preliminary testimony before the Referee on constitutional grounds. Also, the Appellate Division drew an impermissible presumption and inference from his failure to testify after invoking his privilege. Petitioners also argue that the inclusion of Haber in this Court's vacatur and its denial of petition for rehearing as to Haber (— U.S. — 87 S. Ct. 1016) is indicative that this Court had *Garrity* in mind. We submit that no such inference can reasonably be drawn.

POINT II

Petitioners were not denied due process.

Petitioners claim under Questions 4 and 5, and Reasons for Granting of Writ, No. 2 and No. 3, that they were denied due process of law in that the Appellate Division, Second Department, in the creation of the Judicial Inquiry, is the investigator, prosecutor and then sat in judgment in the prosecution of the Petitioners, and has no power to review the conduct of attorneys under Section 90 of the Judiciary Law of the State of New York.

As in the Brooklyn "ambulance chasing" Judicial Inquiry, referred to by this Court in *Anonymous* v. *Baker*, 360 U.S. 287, the Judicial Inquiry in Nassau County was instituted in 1959 by the Appellate Division, Second Department, on the Application of the Bar Association of Nassau County, and respondent herein was nominated by the Bar Association of Nassau County and appointed by the Appellate Division as Chief Counsel. This Order directed that a judicial inquiry and investigation be made, pursuant to New York State Constitution, Article VI, Section 2; Judiciary Law, Sections 90, 86, as to:

1. The alleged improper practices by attorneys and counselors at law in Nassau County;
2. The alleged corrupt and unethical practices by attorneys and counselors at law in Nassau County, in the solicitation of retainers, in the subsequent prosecution and disposition of claims and actions, and in any other matters;
3. Any and all other practices by attorneys and counselors at law in Nassau County, involving professional misconduct, fraud deceit, corruption and crime; and

4. Any and all conduct by attorneys and counselors at law in Nassau County, prejudicial to the administration of justice.

The Petitioners, pursuant to the Special Rule Regulating the Conduct of Attorneys and Counsellors at Law, had filed contingent retainers in personal injury cases as follows:

1956	212
1957	270
1958	225
1959	178

This led to the investigation of Petitioners.

This Court, in *Anonymous* v. *Baker,* 306 U.S. 287, reviewed the nature of the proceedings as to discipline and removal of members of the Bar, placed by law in the Appellate Division of the Supreme Court (Sec. 90, Judiciary Law) and refused to find unconstitutional the procedures followed in such an inquiry.

There is no failure to meet constitutional standards of due process.

As to the power to review the conduct of attorneys under Section 90 of the Judiciary Law of the State of New York, this Court has reviewed many proceedings involving Section 90 since its promulgation, prior to 1912.

In *Erie County Water Authority* v. *Western New York Water Company,* 304 N.Y. 342, cert. denied 344 U.S. 892, this Court held "members of the legal profession of New York are officers of the New York Supreme Court and the Appellate Division of that Court has exclusive jurisdiction to say what constitutes professional misconduct".

In *ExParte Wall,* 107 U.S. 265, this Court, discussing the nature of a disciplinary proceeding, stated (at pp. 288, 290):

"The power to do this (impose discipline for professional misconduct) is a rightful one; and when exercised in proper cases, is no violation of any constitutional provision.

***

"We have seen that, in the present case, due notice was given to the petitioner, and a trial and hearing was had before the court, in the manner in which proceedings against attorneys, when the question is whether they should be struck off the rolls, are always conducted.

***

". . . the action of the court in cases within its jurisdiction is due process of law."

Petitioners claim under Question 6 that the Petitioners were denied due process by the failure of the Appellate Division upon remand to grant a hearing de novo. This position is untenable.

The Order of the Supreme Court directed a remand to the Appellate Division of the Supreme Court of New York, Second Judicial Department, "for reconsideration in light of *Spevack* v. *Klein*".

Upon remand the Appellate Division reversed the conviction on charge 5A (failure to cooperate by invoking the Fifth Amendment) on notice as directed by the Court of Appeals.

We submit that the only issue before the Appellate Division to be decided was that under *Spevack* v. *Klein*, and that such remand could in no way be construed a *general* remand or a reversal for a new trial wherein the entire record is reviewed "de novo" together with any new issues Petitioners wish to raise.

POINT III

Petitioners were charged with and found guilty of violation of Canons of Ethics, Canon 9, not Special Rule 7. There is no ex post facto question involved.

Petitioners claim under Question 7 and Reasons for Granting the Writ, No. 4, that Rule 7, enacted by the Appellate Division on July 1, 1960, is ex post facto as it applies to acts or omissions committed by Petitioners prior to that date.

Charge 5H charges Petitioners with violation of the *Canons of Ethics*. The Canons of Ethics were adopted in New York in 1909; Rule 7 is merely a repetition and amplification of Canon 9 and was promulgated by the Appellate Division because of the disregard shown by attorneys for the prohibitions contained in Canon 9.

The Appellate Division in deciding this case had the Referee's report before it, and notwithstanding the mention of Rule 7 by the Referee, found as to charge 5H—

> "***both respondents, improperly and in *violation of the Canons of Ethics,* used investigators to obtain signed retainers, to obtain adversary statements from parties represented by attorneys***". (Italics added.)

It is apparent that no attention was paid to the Referee's misnomer as to charge 5H and that the finding by the Appellate Division was a violation of Canon 9, Canons of Professional Ethics.

In Reasons for Granting the Writ, No. 5, Petitioners cite *Matter of John Ruffalo, Jr.,* No. 73, October Term, 1967, certiorari granted October 9, 1967. The facts there are not similar to those proven under charge 5H herein and the issues are not the same.

POINT IV

The Referee and the Court considered the evidence as to each Petitioner.

In answer to Question presented, No. 8, the Referee and the Appellate Division had the record and the proof before them. The Referee found both Petitioners guilty of charges 5B, 5F and 5H, and absolved Haber of charge 5A. The Appellate Division, after long and careful consideration of the record and the Referee's Report, saw fit to follow the Referee's recommendations based on the proof.

The Appellate Division could confirm or disaffirm any finding of the Referees, and its ultimate decision is based on the proof alone.

CONCLUSION

The Petition for the granting of a Writ of Certiorari should be denied.

Respectfully submitted,

HAROLD M. SPITZER,
Chief Counsel,
Judicial Inquiry on
Professional Conduct,
Attorney for Respondent.

APPENDIX

Opinion on Order of Disbarment and Suspension.

(Filed March 3, 1965; published, N.Y.L.J. March 4, 1965)

By CHRIST, Acting P.J.; BRENNAN, HILL, RABIN and HOPKINS, JJ.

Matter of Landon Zuckerman and Sam Haber, attorneys —This is a proceeding to discipline respondents, attorneys, based on nine charges or specifications of professional misconduct (Nos. 5-A to 5-I) arising out of the recent Judicial Inquiry into Unethical Practices of Attorneys in Nassau County. The special referee to whom the issues were referred has held extensive hearings and has filed his report. The referee found that one of the charges (5-A) was sustained in so far as the respondent Zuckerman was concerned, but recommended its dismissal as to the respondent Haber. As to both respondents, the referee found that three of the other charges (5-B, 5-F and 5-H) were sustained by the proof. The referee recommended dismissal of the remaining five charges (5-C, 5-D, 5-E, 5-G and 5-I). He recommended the respondent Zuckerman's disbarment on charges 5-A, 5-B, 5-F and 5-H, and the suspension of the respondent Haber from the practice of law for a period of two years with respect to charges 5-B, 5-F and 5-H. Petitioner now moves: (1) to conform the referee's report with respect to the referee's findings as to charges 5-A, 5-B, 5-D, 5-F and 5-H; and (2) to disaffirm the report only in so far as the referee found three of the charges (5-C, 5-E and 5-I) not to be sustained, and in so far as he recommended their dismissal. Apparently, petitioner is content to rest on the referee's recommendation of dismissal of charge 5-A in so far as the respondent Haber is concerned, and on the referee's

recommendation of dismissal of charges 5-D and 5-G. The respondents have each made a cross-motion to affirm in part and to disaffirm in part the referee's findings, and to dismiss the petition. The charges which the referee sustained are: (1) that respondent Zuckerman deliberately refused to co-operate with the court in its efforts to expose unethical practices and to determine whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar [5-A]; (2) that both respondents submitted misleading, exaggerated and false medical bills and statements covering lost time and earnings for the purpose of inducing various insurance companies to part with money in reliance thereon [5-B]; (3) that both respondents have "built up medical bills, for submission to Insurance companies by referring claimants to a succession of doctors," etc. [5-F]; (4) that both respondents, improperly and in violation of the Canons of Ethics, used investigators to obtain signed retainers, to obtain adversaries' statements from parties represented by attorneys, and to obtain the claimants' signatures on blank forms for the appointment of guardians ad litem [5-H]. In our opinion, charge or specification 5-A is amply sustained by the proof in so far as respondent Zuckerman is concerned. We are also of the opinion that as to both respondents the three charges or specifications 5-B, 5-F and 5-H are amply sustained by the proof. We approve the referee's findings that charges 5-C, 5-D, 5-E, 5-G and 5-I have not been sustained by the proof. Charge 5-C is that respondents made gifts of United States Government bonds and cash to referrers of cases; charge 5-D is that the respondents made

payments to others than attorneys in effecting the settlement of negligence cases; charge 5-E is that respondents failed fully and properly to name referrers in statements of retainer; charge 5-G is that the respondents settled infants' claims without court orders; and charge 5-I is that the respondents stirred up litigation by having insurance brokers, doctors, automobile repairmen, police officers, bond recipients and others solicit and refers claims to the respondents' law firm of Zuckerman and Haber. Accordingly, that part of petitioner's motion to affirm the referee's findings as to the four charges: 5-A, 5-B, 5-F and 5-H is granted; and that part of the petitioner's motion to disaffirm the referee's findings as to charges 5-C, 5-E and 5-I is denied, The respondent Zuckerman is found guilty of charges 5-A, 5-B, 5-F and 5-H; and, based upon such guilt, the said respondent is disbarred and his name directed to be struck from the roll of attorneys, effective thirty days after entry of the order hereon. The respondent Haber is found guilty of charges 5-B, 5-F and 5-H, and, based upon such guilt, he is suspended from the practice of law for a period of five years, commencing thirty days after entry of the order hereon. The respondents' cross-motions in so far as they seek a dismissal of the petition are denied; and respondents' cross-motions in so far as they seek to affirm in part and to disaffirm in part the referee's findings are dismissed as unnecessary in view of the disposition made upon the petitioner's motion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 927

IN THE MATTER

of

LANDON ZUCKERMAN and SAM HABER,

Petitioners,

against

SAMUEL GREASON,

Respondent.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

1. The respondent in an attempt to answer questions 1, 2 and 3 lays stress upon the fact that this court when it reversed the order in this case did not mention *Garrity* v. *New Jersey*. But this misses the point of the questions. The questions can be epitomized (and were so treated below): May an attorney be disciplined by the use of evidence obtained through coercive means in violation of the constitutional protection of the Fifth Amendment?

2. The respondent urges in his brief (p. 10), that the petitioners come under a rule of public records required to be kept by attorneys. This argument was the same as made in *Spevack*, and there disposed of by this court. That

contention was made for the first time in this case, in the Court of Appeals, but was not passed upon by that court, for the evident reason that the petitioners contended that *Cole* v. *Arkansas*, 333 U. S. 196, 201, commands that a person be adjudged on the charges at the time of trial and not for the first time in the court of last resort. Moreover, the evidence here clearly shows that the records sought were the attorneys' files and financial records of petitioner. See subpoenas (Petition, Appendix H, page 47 and Appendix J, p. 51). Surely, the files of an attorney are so confidential that not even a court order can compel their exposure, *Hickman* v. *Taylor*, 329 U. S. 495; Section 4503 New York Civil Practice Law and Rules. Financial records were also commanded in *Spevack* but this court found no public aspects in such records.

3. The respondent notes that the petitioners testified without objection. This contention was the principal one he made below, and was passed upon by the Court of Appeals with these words, which we repeat for emphasis from the petition (p. 10):

> "If Zuckerman and Haber's constitutional contention be correct on this appeal, it might be argued with some force that neither of them was obliged to object in order to raise the point, in as much as making that objection could have resulted automatically in their disbarment for so long as *Cohen* v. *Hurley* remained the law."

Indeed, that court was merely repeating what it said in *People* v. *Lucas*, 15 N. Y. 2d 167, citing *Henry* v. *Mississippi*, 379 U. S. 443.

4. Respondent cites *Anonymous* v. *Baker*, 360 U. S. 287 as the answer to the contention of petitioners that Section 90 on its face, as construed and as applied, denies petitioners due process of law. A reading of that case shows that this court expressly held that those issues were *not*

properly before it, and decided the case on an entirely different issue.

It is curious in this connection, that respondent sets forth (p. 12) the number of personal injury cases for which petitioners filed retainer statements, as if the factor of quantity alone, renders an attorney suspect of a wrong that renders him a candidate for inquisition. The respondent is quite frank in admitting such to be the case; he states (p. 12): "This led to the investigation of the Petitioners".

5. In order that an attorney be found guilty of violating Rule 7, it is indispensable that a finding be made that an attorney have knowledge that the adversary from whom a statement is obtained, was at the time represented by counsel, *Matter of Marino and Plesser*, 20 N. Y. 2d 176. There is no evidence in this case, that petitioners had such knowledge. The evidence is to the contrary: the petitioners had no such knowledge.

6. We emphasize that the respondent has failed to answer Question 8 (brief, p. 15). The respondent does not indicate where in the record there is a finding of the guilty conduct as to each of the petitioners separately.

7. We urge, as Judge Fuld did, that the remand by this court and by the remittitur of the Court of Appeals upon its earlier reversal, the petitioners were entitled to a hearing as to the issues of the voluntariness of their testimony or to a dismissal in the alternative.

Respectfully submitted,

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SUPREME COURT, U. S.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that this court grant a rehearing of its order of January 29, 1968, denying the petition for a writ of certiorari, and that a writ of certiorari should issue to review the judgment of the Court of Appeals of the State of New York.

Reasons for Granting Rehearing and Issuing the Writ

1. Petitioners were threatened with disbarment if they failed to furnish information which could have subjected them to criminal prosecution (Charges 5B and 5F represented fraud; charge 5H was a violation of 270B of the Penal Law).

Clearly these disclosures in exposing these petitioners to punishment for crime bring them within the protection of the Constitution (*Matter of Rauss,* 221 N. Y. 81, 86; CARDOZO, J.).

The Fifth Amendment privilege was not invoked because of the threats of disbarment under the then existing law of *Cohen* v. *Hurley,* 366 U. S. 117.

Spevack v. *Klein,* 385 U. S. 511, established these threats were improper and thus the information obtained thereby was coerced in violation of petitioners' constitutional rights. It is a deprivation of due process to use such evidence as a basis for such a severe punishment as a five-year suspension.

The record discloses that innumerable files were inquired into by the Inquiry (Transcript, p. 446). Petitioners were interrogated by the Inquiry at some eleven (11) sessions (Transcript, pp. 450-451). There were additional interrogations by telephone. The petitioners were also interrogated in sessions before Mr. Justice Gulotta (Transcript, pp. 450-451). The Inquiry subpoenaed, demanded and received files, records, papers, including personal financial records (Transcript, pp. 452-457, 468-469, 578-580).

2. The taking by subpoena of the files and records and the evidentiary use thereof constituted a violation of the Fourth Amendment prohibiting illegal search and seizure by public officials and extends to any official proceeding. The evidentiary use by the authority of the product of an illegal search and seizure would be constitutionally prohibitive (*Mapp* v. *Ohio,* 268 N.Y.S. 2d 442).

3. Following the mandate of this Court which required "further proceedings" (17 Sup. Ct. 847), *no hearings were ever held* to ascertain whether petitioners, absent the compulsion stemming from *Cohen* decision, would have asserted their privilege against self-incrimination (See, Mr. Chief

Justice Fuld dissent in petitioners' Court of Appeals decision).

4. The Appellate Division in the instant case relied upon the authority of *Gardener* v. *Broderick*, 20 N. Y. 2d 227, which this Court has granted probable jurisdiction to, and set down for hearing the week of April 22, 1968. It is respectfully requested that certiorari be granted to permit your petitioners to be heard concerning applicable constitutional law that is common to both cases.

CONCLUSION

For the foregoing reasons, it is respectfully requested that a rehearing be granted and that a writ of certiorari issue to the Court of Appeals of the State of New York.

Respectfully submitted,

SAM HABER, *pro se.*

LANDON ZUCKERMAN, *pro se.*

Certificate of Counsel.

We, the undersigned, appearing herein, *pro se,* hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

SAM HABER, *pro se.*

LANDON ZUCKERMAN, *pro se.*